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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11 UNITED STATES OF AMERICA,

12 Plaintiff,

Cr. S-04-139 DFL

13 v .

14 SERGIO ALAN FERNANDEZ,

15 Defendant.

ORDER

16 _____/
17 On October 19, 2005, defendant Sergio Alan Fernandez moved
18 to modify his sentence under 18 U.S.C. § 3852(c)(2). On October
19 31, 2005, defendant moved to vacate his sentence under 28 U.S.C.
20 § 2255. After reviewing defendant's § 3852(c)(2) motion, the
21 court concludes that it should be recharacterized as a motion
22 under § 2255.

23 Before recharacterizing defendant's § 3852(c)(2) motion as a
24 motion under § 2255, the court must: (1) notify defendant that it
25 intends to recharacterize his motion; (2) warn defendant that any
26 subsequent § 2255 motions will be subject to certain

1 restrictions; and (3) provide defendant an opportunity to
2 withdraw the motion or amend it to include all of his § 2255
3 claims. Castro v. United States, 540 U.S. 375, 383, 124 S.Ct.
4 786 (2003).

5 This order serves as the court's warning to defendant that
6 unless he chooses to withdraw the motion, the court will
7 recharacterize it as his first § 2255 motion. If the court
8 recharacterizes this motion, then it will treat the § 2255 motion
9 defendant filed on October 31, 2005, any additional § 2255
10 motions, and any other motions recharacterized as § 2255 motions,
11 as successive § 2255 motions. If a successive § 2255 motion is
12 not certified by an appellate panel, then the court will dismiss
13 it without reaching the merits of the motion. 28 U.S.C. § §
14 2255, 2244. In addition, defendant is hereby warned that failing
15 to include a § 2255 claim in his first § 2255 motion may preclude
16 that claim from ever being heard by a district court. Because of
17 the importance of filing a comprehensive first § 2255 motion, the
18 court is affording defendant an opportunity to withdraw or amend
19 the motion filed on October 19, 2005.

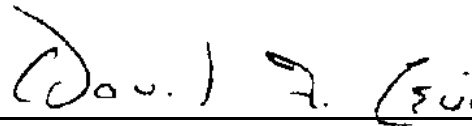
20 If defendant withdraws the motion, the court will treat the
21 § 2255 motion filed on October 31, 2005 as defendant's first §
22 2255 motion. If defendant amends the October 19, 2005 motion,
23 then the court will treat the amendment as the first § 2255
24 motion and the October 31, 2005 filing as a successive § 2255
25 motion.

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1 Defendant has forty-five (45) days from the date of this
2 order to amend or withdraw his October 19, 2005 motion, otherwise
3 the court will recharacterize it as his first § 2255 motion.

4 IT IS SO ORDERED.

5 Dated: 11/21/2005

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9 DAVID F. LEVI
United States District Judge
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